(3)

No. 89-1476

FILED
MAY 31 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

SEATTLE-FIRST NATIONAL BANK,
Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD;
FINANCIAL INSTITUTION EMPLOYEES OF AMERICA,
LOCAL NO. 1182,
CHARTERED BY UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

REPLY BRIEF OF PETITIONER

MARK A. HUTCHESON
STEPHEN M. RUMMAGE *
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

* *Counsel of Record for Petitioner Seattle-First National Bank*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
REASONS FOR GRANTING THE WRIT	1
I. THIS CASE PRESENTS AN IMPORTANT QUESTION REGARDING THE BOARD'S CONTINUITY TEST IN AFFILIATION CASES	2
II. THIS IS AN APPROPRIATE CASE FOR THE COURT TO DETERMINE WHETHER THE BOARD SHOULD CONSIDER EMPLOYEE SENTIMENT IN EXAMINING CONTINUITY	7
III. THIS CASE PRESENTS AN IMPORTANT QUESTION CONCERNING AN EMPLOYER'S RIGHT TO A HEARING ON POST-AFFILIATION CHANGES	8
CONCLUSION	10

TABLE OF AUTHORITIES

Cases Page

American Bridge Div., U.S. Steel Corp. v. NLRB, 457 F.2d 660 (3d Cir. 1972) 6

Garlock Equipment Co., 288 N.L.R.B. No. 31 (Mar. 25, 1988) 3

Hansen v. Guyette, 814 F.2d 547 (8th Cir. 1987) 5, 6

Independent Drug Store Owners of Santa Clara County, 211 N.L.R.B. 701 (1974), *aff'd sub nom. Retail Store Employees, Local 428 v. NLRB*, 528 F.2d 1225 (9th Cir. 1975) 2

Missouri Beef Packers, Inc., 175 N.L.R.B. 1100 (1969) 2

Mosler Safe Co., 210 N.L.R.B. 934 (1974) 7

NLRB v. Bernard Gloekler North East Co., 540 F.2d 197 (3rd Cir. 1976) 6

NLRB v. Financial Institution Employees of America, Local No. 1182 ("FIEA"), 475 U.S. 192 (1986) ..... *passim*

NLRB v. Insulfab Plastics, 789 F.2d 961 (1st Cir. 1986) 5

NLRB v. Metropolitan Life Insurance Co., 380 U.S. 438 (1965) 8

Parks v. International Brotherhood of Electrical Workers, 314 F.2d 886 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963) 4, 5

Seattle-First National Bank v. NLRB, 892 F.2d 792 (9th Cir. 1989) 9

Sun Oil Co. v. NLRB, 576 F.2d 553 (3d Cir. 1978) 6

Statutes

29 U.S.C. § 159(e) 9

Other

Barbash, "Power and the Pattern of Union Government," 9 Lab. L.J. 628 (1958) 4

Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049 (1951) 5

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1476

SEATTLE-FIRST NATIONAL BANK,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD;
FINANCIAL INSTITUTION EMPLOYEES OF AMERICA,
LOCAL NO. 1182,
CHARTERED BY UNITED FOOD & COMMERCIAL WORKERS
INTERNATIONAL UNION, AFL-CIO,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

Seattle-First National Bank submits this Reply Brief in support of its Petition for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on December 20, 1989.

REASONS FOR GRANTING THE WRIT

Rather than focus on the criteria for granting certiorari, the National Labor Relations Board's brief in opposition argues the merits of the underlying substantive issues. The Board's arguments, however, only scratch the surface of the questions raised by Seafirst's petition.

Because of the importance of those questions in the Board's administration of the National Labor Relations Act, the Court should grant the petition and resolve this case on its merits.

I. THIS CASE PRESENTS AN IMPORTANT QUESTION REGARDING THE BOARD'S CONTINUITY TEST IN AFFILIATION CASES.

Seafirst's petition principally challenges the Board's use of a continuity test that results in approval of every affiliation through which an independent union becomes a separate local of an international. The Board's answer to this point appears in a footnote, in which it characterizes as "curious" Seafirst's observation that its criteria are result-oriented.[1] Bd. Br. at 10, n. 10. Despite this cavalier response, the fact is that the Board has *never* found that an affiliation, standing alone, causes discontinuity. Instead, it has found a post-affiliation disruption of continuity *only* when a new affiliate has become a part of an existing local body that seeks to assume representation, *e.g.*, *Independent Drug Store Owners of Santa Clara County*, 211 N.L.R.B. 701 (1974), *aff'd sub nom. Retail Store Employees, Local 428 v. NLRB*, 528 F.2d 1225 (9th Cir. 1975), or when the affiliation has caused a schism, *e.g.*, *Missouri Beef Packers, Inc.*, 175 N.L.R.B. 1100 (1969). In those cases the mergers and the schisms

---

[1] Apart from this footnote, the Board's argument consists of a recitation of its continuity criteria and a recapitulation of its findings. Bd. Br. at 9-10. This case is not, however, a "fact-specific challenge to the Board's decision," rendering most of its response irrelevant. Bd. Br. at 10. Even as far as the facts are concerned, the Board sometimes misses the mark. For example, it asserts that "[a] majority of the Independent's members voted for affiliation." Bd. Br. at 2. In fact, 2624 ballots were mailed to voters (out of a unit of 4790 employees); 1206 ballots, substantially less than 50% of those mailed, were returned in favor of affiliation. Tr. 74; Exs. P-14, P-15.

—not the affiliations—have prompted findings of discontinuity.[2]

This uniform result is no mere coincidence. In its petition, Seafirst explained how the Board's criteria, which focus on day-to-day administrative factors, inevitably lead to the conclusion that every affiliation unaccompanied by a merger or schism preserves continuity. *See* Pet. at 15-19. This disguised *per se* test might be excusable if continuity always existed when an independent union became a separate local of an international. Even in the case of such a "pure" affiliation, however, meaningful losses of autonomy sometimes destroy continuity. In other words, as an empirical matter an affiliation, without more, *can* disrupt continuity, even though the Board's criteria forbid that conclusion.

The experience of employees at the Bunker Hill mines illustrates this point, demonstrating that affiliation standing alone can substantially change "the certified union's relationship with the employees it represents." *See NLRB v. Financial Institution Employees of America, Local No. 1182 ("FIEA")*, 475 U.S. 192, 202 (1986). In that situation, described in Seafirst's petition, the Bunker Hill independent union affiliated with the Steelworkers, which reserved in its constitution the right to veto contracts approved on the local level—just as the RCIU did here. Years after the affiliation, the local's members approved a wage-cutting agreement to keep the mines open. The International then vetoed that agree-

---

[2] Citing *Garlock Equipment Co.*, 288 N.L.R.B. No. 31 (Mar. 25, 1988), the Board implies that it has found a disruption of bargaining relationships absent a merger or schism. Bd. Br. at 10, n.10. Contrary to the Board's implication, however, that case did not involve a newly formed local affiliate seeking an amended certification. Rather, following the independent's affiliation in *Garlock*, a District Lodge of the Machinists Union, which already represented more than 10,000 employees, sought an amended certification in lieu of the independent. *See Garlock*, slip op. at 4.

ment, directly leading to a shut-down of the mines and a substantial loss of employment.[3]

The Steelworkers local at Bunker Hill manifestly was not the "same" union as the independent whose members voted in favor of the contract, especially in terms of its "relationship with the employees it represents." *FIEA*, 475 U.S. at 202. The Bunker Hill situation thus demonstrates that affiliation, without any merger or schism, can create a new and different union from the perspective of the represented employees. Given that fact, the Board's continuity test is ineffective unless it attempts to distinguish between those "pure" affiliations that preserve continuity and those that do not, such as the one at Bunker Hill. In practice, however, as Seafirst showed in its petition, the Board's criteria give no weight to the kinds of changes that occurred upon affiliation at Bunker Hill. Significantly, the Board does not deny that an affiliation of the type that occurred there will always pass muster under its criteria, nor does it so much as discuss the application of its criteria to "pure" affiliations.

The Board instead tries to recast the issues as factual in nature, asserting that the Board has found that "autonomy essentially remains at the local level" and that Local 1182 "could strike without the International's approval." Bd. Br. at 9 & n.9. As a matter of fact, however, the Board in its decision acknowledged "that the International constitution confers broad and pervasive powers," Pet.App. 31a, n.11, and that any strike "must

---

[3] The theory behind such a veto power is that local unions should not be permitted to make "a collective bargaining decision which seriously prejudices larger interests in the union." *Parks v. International Brotherhood of Electrical Workers*, 314 F.2d 886, 907 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963), quoting Barbash, "Power and the Pattern of Union Government," 9 Lab. L.J. 528, 633 (1958). While this rationale explains the restrictions appearing in the Steelworkers (and the RCIU) constitution, it hardly mitigates the impact of the transfer of power on the independent's membership.

also have the approval of the International president." Pet.App. at 30a-31a. The Board simply decided to ignore these facts, asserting that the penalty for unauthorized strikes is generally modest, and that the International's veto power over contracts is justifiable to protect against "sweetheart contracts that result in injury to other locals." Pet.App. 31a.[4] By thus minimizing these "broad and pervasive powers," the Board has declined *as a matter of law* to give any weight to the kinds of changes that lost the Bunker Hill workers their jobs, the very kinds of changes that dramatically alter the "certified union's relationship with the employees it represents." *FIEA*, 475 U.S. at 202.

To remedy these flaws in the Board's criteria, its test must be revised to focus on transfers of power, rather than superficial and easily manipulated administrative details. *See* Pet. at 20. The Board protests that Seafirst's "position would be tantamount to a rule that affiliation, by itself, would raise a question of representation in all cases." Bd. Br. at 10 & n.10. That is not true. If an affiliation occurred in which an independent obtained "bargaining expertise or financial support, or [could] compensate for a lack of leadership within the local union," *FIEA*, 475 U.S. at 199, n.5, without ceding to an international veto power over the union's most vital decisions, continuity would exist. *See NLRB v. Insulfab Plastics*, 789 F.2d 961, 968 (1st Cir. 1986) ("not every international exerts the same degree of control over its member locals"). In this case, however, when the Independent "voluntarily affiliated with the International, it

[4] In fact, the ultimate penalty has been imposed on locals who strike in defiance of International orders. *See*, e.g., *Hansen v. Guyette*, 814 F.2d 547 (8th Cir. 1987) (trusteeship); *Parks v. IBEW*, 314 F.2d at 901 (revocation of charter). The impact of those severe sanctions is not lost on other locals, as a "few well-placed, severe penalties can mark the danger lines which cautious union members will not dare to cross." Summers, "Legal Limitations on Union Discipline," 64 Harv. L. Rev. 1049, 1050 (1951).

bargained away a measure of control over its activities in exchange for the strength it received." *Hansen v. Guyette*, 814 F.2d 547, 551 (8th Cir. 1987) (describing impact of UFCW constitution). The Board's criteria ignore that cession of final control.

This case thus presents a question of law vital to the Board's administration of the Act: Does the Board's continuity test, as applied to pure affiliations, address the proper factors? The answer is no. The Board has developed a test suitable to examine mergers and similar organizational transactions, which often occur within a single international and in which administrative changes may provide insight into more significant issues. That same test, however, gives no inkling of the institutional transformation that an affiliation, without any merger or schism, can accomplish. This Court should therefore grant certiorari and require the Board to develop a continuity test designed to illuminate the changes that can accompany a pure affiliation.[5]

---

[5] In its petition, Seafirst pointed out that its view of the continuity inquiry finds support in a trilogy of Third Circuit decisions. *See American Bridge Div., U.S. Steel Corp. v. NLRB*, 457 F.2d 660 (3d Cir. 1972); *NLRB v. Bernard Gloekler North East Co.*, 540 F.2d 197 (3d Cir. 1976); *Sun Oil Co. v. NLRB*, 576 F.2d 553 (3d Cir. 1978). Because the Third Circuit has not assessed the impact of this Court's decision in *FIEA*, the Board argues that review of this case would be "premature." Bd. Br. at 11. As Seafirst has explained, however, the Third Circuit's test, though first adopted in 1972, conforms to this Court's approach in *FIEA*. It is hardly "premature" for this Court to accept certiorari to clarify that its own decision in *FIEA* requires the Board to adopt criteria more closely approximating those applied by the Third Circuit. The Board also claims that "the decision below is consistent with *American Bridge* and *Gloekler*." Bd. Br. at 11, n.11. This claim of consistency is misguided, as even a cursory review of the two cases discloses.

II. THIS IS AN APPROPRIATE CASE FOR THE COURT TO DETERMINE WHETHER THE BOARD SHOULD CONSIDER EMPLOYEE SENTIMENT IN EXAMINING CONTINUITY.

The Board asserts that this case does not present an issue as to whether it should consider employee sentiment in examining continuity, arguing that "there is no reason to assume" that the 774 union members who voted against affiliation did so "because they believe the union will be dramatically changed." Bd. Br. at 12. When not taking an adversarial position, however, the Board has considered the extent of internal opposition to affiliation to be probative of a bargaining unit's views. *Mosler Safe Co.*, 210 N.L.R.B. 934, 935 (1974). This makes sense, as an affiliation election marked by controversy and broad opposition more likely signifies a substantial change in "a certified union's relationship with the employees it represents," *FIEA*, 475 U.S. at 202, than it does a simple change in the union's name. In this case, apart from the evidence of the vote itself, hundreds of Seafirst employees protested their exclusion from the affiliation decision, after a vigorous campaign that revolved around questions of union autonomy. *See* Pet. at 23, n.9. A realistic appraisal of the record establishes that, in the eyes of Seafirst employees, affiliation was a controversial issue implicating the very nature of their bargaining representative.

These facts present, as clearly as any case will, the question whether the Board should consider evidence of employee views in assessing continuity. In its decision (in contrast to its brief), the Board never denied the probative value of this evidence. It simply found that *FIEA* foreclosed any consideration of employee sentiment. Pet. App. 27a, n.10. In fact, however, giving weight to the unit's views does not accomplish "an end run around the Court's express holding in *FIEA*," Bd. Br. at 12, as the

Board claims. So long as employee sentiment is not deemed dispositive, *FIEA* permits its consideration as one piece of evidence in the continuity inquiry. *Cf. NLRB v. Metropolitan Life Insurance Co.*, 380 U.S. 438, 441-42 (1965) (although Congress forbade Board from using extent of organization as controlling factor in determining unit, it could be considered as one factor). The Board's refusal to entertain evidence of sentiment will doubtless recur, as an affiliation case by its nature includes some indicia of the unit's views. The Court should thus grant the writ to determine whether the Board has acted rationally in declining to consider this valuable evidence.

III. THIS CASE PRESENTS AN IMPORTANT QUESTION CONCERNING AN EMPLOYER'S RIGHT TO A HEARING ON POST-AFFILIATION CHANGES

The Board argues that it properly denied Seafirst a hearing on the General Counsel's 1979 summary judgment motion, citing the need to "discourage[] employers from using protracted litigation to strengthen their case," and invoking the specter of "repeated challenges based on any change that may occur." Bd. Br. at 12-13. Seafirst advocates neither "protracted litigation" nor "repeated challenges." All Seafirst ever wanted was a hearing and the issuance of subpoenas in 1979, when it was first charged with an unfair labor practice. *See* Pet. at 25.[6]

Rather than grant Seafirst a hearing, the Board confined its decisionmaking to evidence adduced four months

---

[6] As one would expect, the Board claims that none of the evidence proffered by Seafirst in 1979 would have made any difference. Bd. Br. at 13, n.14. One can only speculate, however, as to what Seafirst could have unearthed at a hearing, with the assistance of the requested subpoenas. Further, the Board's 1986 decision alluded to some of the very issues raised by Seafirst in 1979, establishing that these points at least played a role in the Board's thinking. *See* Pet. at 25.

after the 1978 affiliation. Despite the absence of any track record, the Board decided "that the focus should be on how the union has functioned in practice under" the International constitution, Pet. App. 15a, and gave short shrift to the one piece of evidence—the constitution itself—that could have been meaningful without the passage of time.[7] By thus focusing on practice, while refusing to grant a hearing after the practice became known, the Board imposed on Seafirst the absurd burden of proving *future* events, *i.e.*, "the future changes expected in the relationship" between the new affiliate and its parent. *Seattle-First National Bank v. NLRB*, 892 F.2d 792, 797 (9th Cir. 1989). Not even the Board defends the rationality of conducting a hearing on such speculative issues. Unless this Court grants certiorari, however, employers challenging continuity will have no choice but to try hypothetical cases, in the manner suggested by the court below.[8]

---

[7] If the Board's continuity inquiry focused on transfers of power, it could examine the structural changes accomplished by the documents effecting the affiliation, without awaiting further developments. Thus, the analysis advocated by Seafirst would dispense with the need for a later hearing.

[8] The Board downplays the prospect of subsequent changes in the bargaining representative because dissatisfied employees "may file a decertification petition." Bd. Br. at 13. This assertion ignores the obstacles confronting employees wishing to oust an incumbent union. In this case, a decertification effort would have required employee-sponsored decertification petitions bearing the signatures of 1437 Seafirst employees, 30% of the unit. 29 U.S.C. § 159(e). *See* Tr. 74 (unit consisted of 4790 employees). This is 230 employees more than voted in favor of the affiliation.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

DATED this 31st day of May, 1990.

MARK A. HUTCHESON
STEPHEN M. RUMMAGE *
DAVIS WRIGHT TREMAINE
2600 Century Square
1501 Fourth Avenue
Seattle, WA 98101-1688
(206) 622-3150

* *Counsel of Record for Petitioner Seattle-First National Bank*